THIAGARAJAH POOINPATARSAN

v.

SHANMUGAM PARAMSOTHY & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[CIVIL SUIT NO. C8443 OF 1985]
3 AUGUST 1987

ARBITRATION: *Arbitration clause - Width and ambit - Interpretation - Powers of arbitrator - Sections 6, 16, 27 of Arbitration Act.*

CIVIL PROCEDURE: *Proceeding by plaintiff - Stay application pending reference to arbitration - Arbitration clause in agreements - Interpretation - Whether covers subject matter in plaintiff's claim - Discretion of Court - Onus on plaintiff.*

The plaintiff, on instituting proceedings had served writs on the 2nd and 3rd defendants. The plaintiff then applied for various interim orders designed to maintain the *status quo* pending the disposal of the action. At this hearing, the 2nd and 3rd defendants Counsel neither opposed nor consented to the plaintiff's application; the 1st defendant was overseas and against him, the hearing was *ex parte*. The plaintiff was granted some of the orders.

The 1st defendant was then served with the writ and he then sought an order for stay of the proceedings pending a reference of the disputes between the parties to arbitration; this application was supported by the 2nd and 3rd defendants. The agreements entered into between the parties contained identical arbitration clause.

The issues for determination by the Court were whether the matters to be resolved by the writ were covered by the arbitration clauses in the agreements entered into by the parties, whether the defendants were prevented from applying for a stay pursuant to s. 6 of the Arbitration Act (the Act) and the types of orders in which could be made by the arbitrator under the Act.

Held:

[1] The appearance of Counsel of the 2nd and 3rd defendants during the plaintiff's application for interim orders and Counsel informing the Court as he did that his instructions "at this stage" were not to oppose or consent to the order sought by the plaintiff does not amount to a step in the proceedings. The 2nd and 3rd defendants are therefore not deprived of the right to apply to the Court for a stay of the proceedings.

[2] The arbitration clause in each of the two agreements which refers to "... all disputes and questions whatsoever touching this deed on the construction or application thereof ..." and "... or as to any act, deed or omission of any party ..." is very wide and makes it clear that the parties had agreed that all differences between them arising out of or incidental to the written agreements should be resolved by arbitration.

[3] The statement of claim discloses that every one of the issues raised therein come well within the ambit of the arbitration clause.

[4] The Court has a discretion to refuse to stay proceedings pending arbitration but the onus of demonstrating only the arbitration clause should not be given effect is on the plaintiff who has brought the action.

[5] The orders sought by the plaintiff could be granted by the arbitrator and are enforceable pursuant to s. 27 of the Act.

[6] In the circumstances of the case the plaintiff has not shown why the arbitration clause should not be given effect and the Court will not interfere with the parties agreement to have their differences adjudicated by an arbitrator.

[Defendants' application for stay allowed.]

Cases referred to:
Willesford v. Watson [1873] 7 LR 473
Ford v. Clarksons Holidays Ltd. [1971] 1 WLR 1412

Legislation referred to:
Arbitration Act 1952, ss. 6, 16, 27

Other source referred to:
Russel on Arbitration 18th Edn., 146, 147

For the plaintiff - R.D. Rajasingam; M/s. Lewis & Co.
For the 1st defendant - Cyrus V. Dass & R. Abraham; M/s. Shook Lin & Bok
For the 2nd & 3rd defendants - S.H. Amiruddin; M/s. Sri Ram, Zulkifly & Kumar

JUDGMENT

VC George J:
[On encl. (6)]

The plaintiff having caused the writ herein to issue and having served the writ together with the statement of claim on the 2nd and 3rd defendants, took out a summons seeking various interim orders designed to maintain the *status quo* until the disposal of the action or further order. As against the 1st defendant who lives in the United States of America, this application was heard on an *ex parte* basis. The 2nd and 3rd defendants were represented at the hearing of the application by Counsel who took the position that the 2nd and 3rd defendants were neither opposing nor consenting to the orders sought. His instructions were to remain as he put it "silent at this stage" and he remained silent. Orders in respect of some of the prayers in the summons were granted. Thereafter the 1st defendant was served with the writ in the United States on 16 January 1986. He was given 30 days to enter an appearance within which time he did enter an appearance and soon thereafter took out the summons, encl. (16) seeking *inter alia* an order for the proceedings to be stayed pending a reference of the disputes between the parties to arbitration. At the hearing of the application the 2nd and 3rd defendants supported the 1st defendant in his application.

For the defendants it was in effect contended that all matters to be resolved by the writ were disputes and questions touching on the effect and/or the application of the terms of two written agreements that had been entered into by the plaintiff and the 1st and 2nd defendants, the first of which was on 28 February 1979 and the second on 25 February 1980 and in any event were in respect of the "acts, deeds or omissions" of the parties to the said agreements within the meaning of the arbitration clause in each of the agreements by which

the parties to the agreement had agreed that all such disputes and questions and matters should be resolved by arbitration and that accordingly there should be a stay of the proceedings herein pending such arbitration.

The plaintiff contended that in respect of the 2nd and 3rd defendants, Counsel, on their behalf, appearing at the hearing of the plaintiff's application for the aforesaid interim orders amounted to the taking of a step in the proceedings which, pursuant to provisions in s. 6 of the Arbitration Act 1952 deprived them of the right to apply to the Court to stay the proceedings. It was further submitted that the Court should in any event refuse the application on the ground that the issues for adjudication in the case were such that some of them were outside the scope of the arbitration clause and that some, if not all, the issues were not suitable for arbitration. It was also contended that some of the orders sought by the plaintiff were of such a nature that they could not be effectively given by an arbitrator.

As to the submission that the 2nd and 3rd defendants had waived their right to insist on arbitration, I am of the opinion that their appearance by Counsel in chambers and remaining silent as it were when the application was made does not amount to a step having been taken in the proceedings by them. In *Russel on Arbitration* 18th Edn., 146 and 147 illustrations of what have been held to be "steps in the proceedings" and examples of what were held not to be such steps are set out. It seems to me that Counsel at the hearing remaining silent falls squarely within the second category of cases. Counsel informing the Court as he did that his instructions "at this stage" were not to oppose or consent to the order sought does not in my judgment amount to a step in the proceedings. The 2nd and 3rd defendants are not precluded from joining the 1st defendant in asking for a stay of the proceedings pending arbitration.

Now the arbitration clause in each of the agreements is identical and is of the widest compass:

> All disputes and questions whatsoever touching this deed or the construction or application thereof or any clause or thing herein contained or as to any act, deed or omission of any party hereto shall be referred to a single arbitrator to be appointed by the President of the Bar Council of Malaya for the time being upon request by any of the parties hereto. Such arbitration shall be subject to and in accordance with the Arbitration Act No. 53 or any statutory modification thereof for the time being in force.

It covers not only all disputes and questions touching on the agreement but also any act, deed or omission of any party to the agreement. I pause to note that in the context the reference to "any act, deed or omission" no doubt must be restricted to those pertaining to or incidental to the written agreements. With that clarification it is clear that the parties had solemnly agreed that all differences between them arising out of or incidental to those agreements should be resolved by arbitration.

It is now necessary to turn to the statement of claim to ascertain whether the issues raised arise out of or are incidental to the two agreements.

I propose going through the statement of claim paragraph by paragraph. Having given in paras. 1 to 5 the background and the facts relevant to the formation of the two agreements the plaintiff in para. 6 refers to the coming into existence of the two agreements and draws attention to some of the terms therein with particular emphasis to the fact that as a result of the agreements he was to be admitted as a shareholder of the 3rd defendant company and was entitled to be the beneficial as well as the registered owner of 25% of the shares that should have been issued in the company, the agreed consideration for which amounting to

RM95,000 having been paid as agreed to the 1st defendant. This he says by para. 7 of the statement of claim. By paras. 8 and 9 he complains of the defendants not having implemented what they were obliged to implement in accordance with the terms of the 2 agreements. By paras. 10, 11, 12 and 13 the plaintiff lays the basis for and contends that the 1st defendant not being in possession of an annual practising certificate issued pursuant to the Medical Act 1971, is not entitled to a share of the profits of the medical practice that the parties were supposed to be partners of as a result of the two agreements and in respect of directors fees (*vis-a-vis* the 3rd defendant company). The claim to a share of the profits and to the directors' fees by the 1st defendant arise or stems from the two agreements. Paragraphs 14, 15 and 16 again deal with failure to implement what was agreed to be implemented by the two agreements. Paragraphs 17, 18 and 19 deal with what amounts to breaches of para. 4(2) in each of the agreements, that is, that so long as the parties to the agreement were shareholders in the 3rd defendant company they were not to engage in any way whether directly or indirectly in the practice of medicine. In any event, those paragraphs have reference to acts, deeds or omissions on the part of the 2nd defendant which are incidental or are related to the agreements. And by the last paragraph of the statement of claim before the prayers, the plaintiff as if by way of emphasis that the subject matter of the claim arises out of the two agreements says:

> 20. At all material times, the plaintiff has been and is now ready and willing to fulfil his part of the obligation under the 1st and 2nd agreements.

The statement of claim discloses that every one of the issues raised therein come well within the ambit of the arbitration clause.

In *Willesford v. Watson*, Lord Selborne LC said at 480:

> If parties choose to determine for themselves that they will have a domestic forum instead of resorting to the ordinary Courts, then since that Act of Parliament was passed a *prima facie* duty is cast upon the Courts to act upon such an agreement. The parties here have made that agreement. They probably knew what were the reasons in favour of determining these questions by arbitration, and what were the reasons against it, and they made it part of their mutual contract that these questions should be so determined. The plaintiffs cannot, therefore, be now heard to complain if that part of their contract is carried into effect.

However, the Court has a discretion to refuse to stay proceedings pending arbitration but the onus of demonstrating why the arbitration clause should not be given effect is on the plaintiff who has brought the action. In *Ford v. Clarksons Holidays Ltd.*, Lord Selbourne's statement of the law was cited and at 1418 Edmund Davies LJ went on to state:

> But I would certainly direct my mind in the way in which the Court has done in a number of the reported cases: namely, that, once the dispute is within a valid and subsisting arbitration clause, the burden of showing cause why effect should not be given to the agreement to submit is upon the party opposing the application to stay.

As has been seen the arbitration clause in each of the two agreements in the instant case are of the widest compass and each of the complaints made by the plaintiff in the statement of claim appear to fall within their ambit. The burden is on the plaintiff to show cause why effect should not be given to that term in the contract to which he was party to.

En. Rajasingam of Counsel for the plaintiff canvassed a number of grounds in attempting to show cause. He referred to the prayers in the statement of claim and pointed out that they had reference to many and various matters. He contended that the arbitration clause did not contemplate many of the issues before the Court.

As has been seen, the words used in the arbitration clause are "all disputes and questions whatsoever touching this deed or the construction or application thereof" and "or as to any act, deed or omission of any party ...". I cannot comprehend an arbitration clause of wider compass than that. In my judgment all the issues in this case come well within the arbitration clause and accordingly must have been in the contemplation of the parties to the agreements.

En. Rajasingam next says that the agreement was in respect of the sale of shares in a limited liability company and has nothing to do with the medical partnership. I see no merit in this as it is inarguable that the partnership in the medical practice stems from the shareholding in the 3rd defendant company. That was clearly in the contemplation of the parties and it was on that contemplation that the parties have or were expected to have conducted themselves.

En. Rajasingam forcefully urged the Court to refuse the stay sought on the ground that a number of questions of law had to be decided in adjudicating on the issues raised by the pleadings. This again I think was in the contemplation of the partners when they settled the arbitration clause. The arbitrator they had in mind was not a member of the medical profession but one to be appointed by the President of the Bar Council. Obviously they wanted a lawyer to be appointed as arbitrator and that suggests that they had in mind that even questions of law would be decided by the arbitrator.

The other point taken by Counsel was that many of the orders sought could not be made by an arbitrator. The first and it seems to me the most important prayer by the plaintiff is the specific performance of the two agreements. The other prayers are incidental or consequential to the main prayers for specific performance. Section16 of the Arbitration Act expressly empowers an arbitrator to order specific performance. The terms of s. 16 puts paid to this contention of En. Rajasingam.

As to the other orders in respect of which fears were expressed by Counsel that the arbitrator would not be able to make orders that could be enforced e.g. order the rectification of share register, make vesting orders and order a dissolution of partnership, s. 27 of the Act provides the answer. Section 27 provides that an award made by an arbitrator may by leave of the High Court be enforced in the same manner as a judgment or order to the same effect. The policy that usually governs professional people practising their profession in partnership or group providing an arbitration clause in respect of disputes arising out of their professional relationship is to avoid the intimacies of their relationship being exposed in the shadowless and merciless glare of the limelight of a hearing in open Court. The objective is to avoid the washing of dirty linen in public.

In all the circumstances I see no call for the Court to exercise its discretion and interfere with what the parties had agreed to - to have their differences adjudicated *in camera* by a private tribunal.

There will be an order in terms of prayer 1. The interim injunction ordered on 15 January 1986 will continue to obtain until further order. The costs of and incidental to the application of the 1st defendant will be paid by the plaintiff. As to the plaintiff and the 2nd defendant each party will bear its own costs. There will be no orders in respect of prayers (2), (3) and (4). There will be liberty to apply.

Also found at [1990] 2 CLJ 312